

Protest of)	Date: December 15, 1988
)	
CIMPI EXPRESS LINES, INC.)	
)	
Solicitation No. 010-269-88)	P.S. Protest No. 88-57

DECISION

Cimpi Express Lines, Inc. (Cimpi), timely protests the contracting officer's determination that it is a nonresponsible bidder under Solicitation No. 010-269-88, issued June 15, 1988, by the Springfield Transportation Management Service Center (TMSC), for the highway transportation of mail from Buffalo and Rochester, NY, to Pittsburgh, PA, for a term beginning October 1, 1988 or later, and ending June 30, 1992 and the immediate award of the contract to another, higher, bidder.

The service solicited involves numerous daily trips between the New York and Pennsylvania termini, using a fleet of 8 tractors and 40 trailers. The estimated annual mileage on the route is 1,975,519 miles, estimated to involve 50,691 annual driver hours. Cimpi's bid, at an annual rate of \$1,544,730, was the lowest of 22 bids received. Both Cimpi and the second low bidder were determined nonresponsible and on August 19 award was made to the third low bidder, Dittrich of Minnesota, Inc. (Dittrich), at an annual rate of \$1,589,403.

By letter dated August 18, the contracting officer advised Cimpi of his determination of its nonresponsibility, stating that "[t]he finding of non-responsibility is based on [Cimpi's] failure to demonstrate affirmatively to the Contracting Officer that [it has] the necessary organization, experience, operational skills and technical controls to operate a contract of this size and scope."^{1/} By letter of September 1, Cimpi protested to this office the contracting officer's nonresponsibility determination and the award to Dittrich.

^{1/}This phrase derives from the discussion of responsibility at Procurement Manual (PM) 3.3.1 a. and b.5., which provide, in pertinent part, that a prospective contractor must affirmatively demonstrate its responsibility and that to be responsible a prospective contractor must have "the necessary organization, experience, accounting and operational controls, technical skills, production and property controls, and quality controls, or the ability to obtain them;" or from the discussion of additional standards for responsibility at Postal Contracting Manual (PCM) 1-903.2 i), which provides that prospective contractors must "have the necessary organization, experience, operational controls and technical skills, or the ability to attain them...." Although Cimpi has referred to the PM throughout its submissions, in fact this procurement, initiated by a solicitation issued prior to the July 1, 1988, application of the PM to mail transportation contracts (see paragraph F of PM Transmittal Letter 2, June 1, 1988), should have been governed by the previously applicable regulations set out in the PCM. Accordingly, we will refer to the PCM as the applicable regulation throughout this decision. This difference does not affect the result. See Todd Crissman, P.S. Protest 88-55, September 23, 1988.

Cimpi argues that there is no basis for the contracting officer's determination. Cimpi alleges that its principal attended numerous meetings with Postal Service representatives providing each and every document that they requested which related to its ability to perform the contract.^{1/} Cimpi notes it is currently operating a contract administered by the Springfield TMSO and that its principal has been actively associated with mail hauling for a number of decades.

Cimpi maintains that its financial ability to perform is supported by a \$1,000,000 credit guarantee that it has secured. That credit guarantee would allow it to obtain the necessary resources to operate the route from a headquarters which it planned to locate at the head out point specified in the solicitation. In addition, Cimpi adds that it acquired on its own initiative a four-year performance bond which it voluntarily offered to provide to the Postal Service.

Additionally, Cimpi alleges that the contracting officer never inquired into its organization, operational controls, or technical skills. If it had, Cimpi states, it would have provided the names and backgrounds of its Board of Directors who have broad-ranging expertise in the financial and transportation fields, which expertise is immediately available as a resource to Cimpi.^{1/}

Cimpi admits that inquiry was made as to its operational plan at an August 18 meeting, at which it states it provided an operational plan which included the securing of the necessary personnel and facilities to implement the contract through use of the financing it had acquired.

Additionally, Cimpi claims that the contracting officer, in essence, told Cimpi that it was

^{2/} The contracting officer states that Cimpi failed to provide him with a copy of a current balance sheet, a profit and loss statement, and a cash flow statement. Cimpi does not contest the contracting officer's statement on this point. As our resolution of this protest makes clear, these documents are relevant to a prospective contractor's ability to perform. We, therefore, qualify Cimpi's statement to reflect this fact.

^{3/} Cimpi mischaracterize the process of determining a bidder responsible. The bidder has the duty to establish its responsibility affirmatively. See National Fleetway, Inc., P.S. Protest No. 80-26, July 3, 1980. As Cimpi would have it, it would need to provide information relevant to its planned management of a \$1.5 million contract only if specific inquiry is made about that issue. We disagree. Although a prospective contractor need not provide information which is available from other sources, See Sixto Garrastegui Exclusa, P.S. Protest No. 87-66, August 24, 1987, the contractor minimally has constructive notice, as part of establishing its responsibility, to provide specifics of how it will manage a particular operation. This requirement follows from the fact that prospective awardees are on notice of the contents of the PCM. See Eric Hefty & Associates, P.S. Protest No. 87-102, February 10, 1988. This includes the PCM's standards of responsibility quoted in footnote 1, above. To the degree the conflict here constitutes a factual dispute, as to whether inquiry was made about Cimpi's management plans, we must accept the contracting officer's position since the record reasonably supports that position. See Fairfield Stamping Corporation, P.S. Protest No. 88-04, June 3, 1988, indicating that he made specific inquiry about Cimpi's "management plans, operational plans, driver resources, maintenance plans, and operational controls" in a telephone conversation on August 16 and follow-up letter of that day.

too small to handle a contract of the size and scope contemplated by Solicitation No. 010-269-88. Cimpi admits that it is a small business within the meaning of PM 10.1.1(b)(1), but counters that it believed the Postal Service had an affirmative policy favoring contracts with small businesses.^{4/} Although Cimpi protests the immediate award to Dittrich, no specific reasons are given to support the claim that award to Dittrich was inappropriate.^{1/}

CONTENTIONS OF THE PARTIES

In his statement on the protest, the contracting officer restates his advice that Cimpi was found nonresponsible due to its failure to demonstrate affirmatively that it has the necessary organization, experience, operational controls and technical skills to operate a contract of the size and scope required.

The contracting officer indicates that the information and documentation acquired from Cimpi and other sources for purposes of determining Cimpi's responsibility show:

- (1) Cimpi's current operation, HCR 13035, discussed further below, comprises two trucks with no garage or maintenance facilities; the trucks are parked at a driver's home;
- (2) Cimpi's current mail contract operates between Syracuse and Oswego, NY; with an annual rate of \$132,568 and an annual mileage of 73,092 miles, less than one-twentieth of the service solicited here.
- (3) Cimpi was incorporated on October 29, 1986. William D. Cimpi is its President and the only member of the Board of Directors.

The contracting officer states that the Postal Service gave Cimpi adequate opportunity to provide the names and backgrounds of any new members of its board of directors after specific inquiry was made about its organization. The contracting officer states he became aware of the additional board members only in the course of this protest.^{1/}

^{4/} This point does not warrant extensive discussion. While there is no dispute that Cimpi is a small business and that the Postal Service policy encourages the participation of small businesses in its procurements (PCM 1-702(a)), nothing in that policy overrides the requirement that contracts be made only with responsible contractors. The Postal Service's experience has been that the overwhelming majority of its highway mail transportation contracts are entered into with small businesses. While the contracting officer vigorously disputes Cimpi's assertions with regard to this aspect of its protest, we need not resolve the matter, as it is irrelevant to the issue before us.

^{5/} We need not further consider this ground of protest since Cimpi lacks standing to contest the award to Dittrich. In order to protest the award of a contract, the protester must be eligible for award should the protest be sustained. Our resolution of this protest supports the contracting officer's nonresponsibility determination. As a result, Cimpi is not eligible for award and, therefore, lacks standing to protest the award to Dittrich. See Savioa Corporation, P.S. Protest No. 87-126, April 5, 1988.

^{6/} See discussion at footnote 3 above.

The contracting officer indicates that Mr. Cimpi stated several times that he was in contact with several trucking firms in an attempt to enter into a "joint venture" on the solicited contract due to its size and that he was open to a possible "buy in" to his corporation. The contracting officer states that these representations suggested that Cimpi does not possess the equipment and operational controls to service the route.

The contracting officer states that although Mr. Cimpi has been actively involved with mail hauling for the Postal Service for a number of decades, a review of the previous routes operated by corporations with which Mr Cimpi has been associated indicates a less than successful service record. The contracting officer summarizes the relevant experience in the following way:

1. Mr. Cimpi was President^{1/} and Director of Cimpi Transportation Corporation (CTC), which CTC operated two highway contract routes, HCR 01111 and HCR 01115. HCR 01111 was for the carriage of mail between Springfield, MA and Washington, DC., requiring four tractors and eleven forty-five foot trailers. CTC operated the contract from January 16, 1982 until June 30, 1983, when the contract was terminated for default due to unsatisfactory service. HCR 01115 was for the carriage of mail between Springfield, MA and Detroit, MI, requiring one tractor and two forty foot trailers. The term of the contract was from January 23, 1982 until June 30, 1983, when it was not renewed due to unsatisfactory service.

2. Mr. Cimpi was the President and Director of Trans Leasing, Inc. Trans Leasing operated three highway contract routes, HCR 01016, HCR 130KU and HCR 13035. HCR 01016 called for service between Springfield, MA and Albany, NY utilizing two twenty-two foot vans with an annual mileage of 128,276 miles. Trans Leasing operated the route from November 24, 1984 until April 17, 1985, when it was terminated for default for unsatisfactory service. HCR 130KU was an emergency contract operated between Syracuse, NY and New Jersey, requiring two tractors and two forty-five foot trailers. HCR 130KU was operated successfully during its term from May 10, 1986 until November 7, 1986. HCR 13035 was a contract for the carriage of mail between Syracuse and Oswego, NY, requiring two twenty foot vans. Trans Leasing successfully operated the route from August 31, 1980 until October 2, 1987, when it was novated to Cimpi. During Trans Leasing's operation of the route it was renewed twice.

3. Cimpi operated two emergency contracts, HCR 130BU and HCR 130GU. HCR 130BU involved service between Syracuse, NY and New Jersey utilizing two tractors and two forty-five foot trailers. Cimpi operated the contract successfully during its term from November 8, 1986 until May 7, 1987. HCR 130GU called for service between Syracuse, NY and New Jersey utilizing two tractors and two forty-five foot trailers. Cimpi operated the route from May 8, 1987 until August 9, 1987, when it was terminated for unsatisfactory service.^{1/} Cimpi continues to operate HCR 13035

^{1/} As discussed infra, this conclusion was incorrect. William D. Cimpi was Vice-President of CTC.

^{8/} In rebuttal and surrebuttal comments Cimpi and the contracting officer have contested the circumstances of the termination of HCR 130GU. We need not recite those views at length, but the

successfully.

According to the contracting officer, HCR 13035 is managed in its day-to-day activities by one of the drivers. When requested to provide a current balance sheet, a profit and loss statement and a cash flow statement for Cimpi, Mr. Cimpi indicated that none of those items were available.

During a pre-award conference it was established that Mr. Cimpi was unaware that the Social Security rate had increased effective January 1, 1988. Cimpi has requested no economic adjustments on HCR 13035 since July 1, 1987, although due to factors such as the Social Security rate increase it would be entitled to them. The contracting officer concludes that these failings indicate that Cimpi lacks the necessary business expertise and skills to operate the solicited route.

The contracting officer's statement also addresses Cimpi's financial capability and its acquisition of a performance bond, matters raised by Cimpi's protest. The contracting officer points out that the loan guarantee was contingent upon the receipt of a contract from the Postal Service.^{1/} He argues that the ability to obtain credit after the award of a \$1,500,000 contract does not prove that a prospective awardee is responsible since the responsibility determination has to be made prior to award, precluding consideration of post-award financial assets. As to the performance bond, the contracting officer points out that no bond is required by the Postal Service, so it is not relevant to the determination of responsibility.^{1/}

In reply, Cimpi takes the contracting officer to task for having addressed the issue of Cimpi's financial resources since that basis was not included as a ground for determining Cimpi nonresponsible. Cimpi contends that any claims made in its protest

record reflects that while the contract was not terminated for default, the precipitating cause which led to the Postal Service's termination of the contract on notice under paragraph 5 was unsatisfactory performance.

^{9/} The loan guarantee states in pertinent part:

It is understood that this Credit Guarantee is to be used to guarantee the purchase of equipment and provide operating capital for the U.S. Postal Services Transportation Services Contract....This commitment is based upon proper documentation with review and approval by Sisson International.

Cimpi argues that the quoted language constitutes an irrevocable guarantee, which is not contingent upon award. We disagree. Clearly, the credit guarantee is predicated on the existence of a Postal Service contract. Furthermore, the language envisions review and approval by Sisson International, conditions which emphasize the contingency of the guarantee.

^{10/} Due to our determination that financial responsibility is not at issue in this protest, we need not further consider the relevancy of the performance bond. We note, however, that a performance bond "cannot serve as a substitute for a determination of financial responsibility." Oertzen & Co. GmbH, Comp. Gen. Dec. B-228537, February 17, 1988, 88-1 CPD & 158.

which are uncontroverted by the contracting officer must now be construed favorably to Cimpi. Cimpi implicitly argues because a poor prior performance record was not specifically enumerated as a basis for the finding of nonresponsibility, it cannot play a role in the subsequent justification of the determination.

Cimpi also addresses the specific issues raised by the contracting officer's statement. It first argues that the contracting officer wrongfully associates Cimpi's principal, William D. Cimpi, with CTC. Cimpi points out that William D. Cimpi held only a minority interest in CTC. CTC's President and Chief Executive Officer was William A. Cimpi, the father of William D. Cimpi. In sum, Cimpi argues that its principal is not chargeable with the failures of CTC; nor can it be evaluated based on the actions of William A. Cimpi.^{11/}

Cimpi maintains that the only performance records relevant to a responsibility determination regarding Cimpi are its own and those of Trans Leasing, Inc., another corporation in which William D. Cimpi was the sole shareholder, officer, and director. Concerning Trans Leasing's operations, Cimpi contends that the termination of HCR 01016 was the subject of a settlement agreement which precludes it from being used to justify the nonresponsibility determination here.^{12/}

Cimpi adopts the contracting officer's findings concerning the successful operation of HCR 130KU, HCR 130BU, and HCR 13035, emphasizing the several years of continuous successful operation of HCR 13035 by companies in which William D. Cimpi has had a controlling interest.

Cimpi reiterates its claims that the contracting officer did not request information about its board of directors. Cimpi contends that, since the required Pre-Award Questionnaire, PS Form 5472, requests only information about a bidder's officers, it was not on notice that it should volunteer information about its new Board members.

Cimpi argues that its decision not to request available increases under an existing contract is based on its business judgment and that such a decision is one that Cimpi is clearly entitled to make, claiming that as a practical matter the Postal Service has a "track record" of reducing some other component of compensation in order to offset any real increases.

^{11/} In this regard, Cimpi's protest notes that William A. Cimpi was the subject of a debarment from contracting. Since the contracting officer did not identify the debarment as a factor in his determination, that event is not relevant here and is not further discussed.

^{12/} That settlement agreement states in relevant part:

It is understood and agreed that the Postal Service shall not utilize the facts underlying ... its default termination on HCR-01016 ... to preclude Trans Leasing, its principal or its affiliates from establishing compliance with minimum standards for responsible prospective contractors on existing or possible future contracts.

In conclusion, Cimpi contends that the strained logic and fallacious reasoning contained in the contracting officer's statement, coupled with its vitriolic nature make it clear that the contracting officer has singled out Cimpi for special adverse treatment. Cimpi can only assume that this special treatment results from Mr. Cimpi's previous settlement of litigation involving that same contracting officer.

In further response, the contracting officer addresses four issues which he believes require clarification. First, the contracting officer explains that he addressed matters relating to Cimpi's financial responsibility in his statement in response to the protest because Cimpi had raised them in the protest. Cimpi's financial responsibility was not a basis for the nonresponsibility determination. Second, he states that Cimpi had the opportunity to elaborate on the "broad-ranging expertise" of its board of directors in response to his August 16 telephone conversation and follow-up letter in which he indicated Cimpi should provide information about its "management plans, operational plans, driver resources, maintenance plans, and route supervision."

Third, the contracting officer states he was unaware of the settlement agreement which precluded use of performance under HCR 01016 in subsequent responsibility determinations. In any case, that information was cited to rebut Cimpi's claim to have been a successful postal contractor for years.

Finally, the contracting officer attaches documentation which he says show that, although William D. Cimpi was not the president of Cimpi Transportation, Inc., he was its principal operating officer, who signed bids and other contract documents on its behalf.

In further response, Cimpi states that any documentation which tends to show that William D. Cimpi had a managing role in CTC ignores the fact that he was a minority shareholder in a corporation controlled in its day-to-day activities by another. Cimpi alleges that William D. Cimpi's inability to bring about changes within CTC led to his break with that company.

DISCUSSION

The standard for this office's review of a determination of nonresponsibility is well established:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with the available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

Craft Products Company, P.S. Protest No. 80-41, February 9, 1981; Pamela J. Sutton, P.S. Protest No. 87-110, February 9, 1988; Todd Crissman, supra. The policy

underlying responsibility determinations, the requirement for such determinations, and the action to be taken in the absence of such a determination are clearly stated in the PCM, at 1-902:

The award of a contract to a supplier based on lowest evaluated price alone can be a false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional procurement or administrative costs. While it is important that purchases be made at the lowest price, this does not require an award to a supplier solely because he submits the lowest bid or offer. A prospective contractor must demonstrate affirmatively his responsibility.... The contracting officer shall make a determination of nonresponsibility if after compliance with 1-905 and 1-906, the information thus obtained does not indicate clearly that the prospective contractor is responsible.

The basis of the contracting officer's decision in this case is found at PCM 1-903.2(i) which specifies that to be determined responsible a prospective contractor, as appropriate, must "[h]ave the necessary organization, experience, operational controls and technical skills, or the ability to attain them....". Since the contracting officer and Cimpi agree that Cimpi was determined nonresponsible for failure to meet the standards stated in PCM 1-903.2(i), and not on the grounds of its financial capability, we need not consider Cimpi's financial status except as it bears on its ability to have or obtain the skills necessary to perform the required service. The contracting officer's discussion of Cimpi's financial status was appropriate, once Cimpi referred to it as evidence of its ability to obtain those skills.¹⁷

Cimpi's allegation that the contracting officer's decision is the product of bias may be summarily resolved since it is not supported by the record. To prove that the contracting officer acted with bias, a protester must affirmatively establish with sufficient evidence that the contracting officer "had a specific and malicious intent to harm the protester, since contracting officers otherwise are presumed to act in good faith. Prejudicial motives will not be attributed to such officials on the basis of inference or supposition." I.C., Inc., P.S. Protest No. 86-06, April 25, 1986, quoting Rodgers-Cauthen Barton-Cureton, Inc., Comp. Gen. Dec. B-220722.2, January 8, 1986, 86-1 CPD & 19; Marshall D. Epps, P.S. Protest 88-47, September 15, 1988. Cimpi offers no evidence that establishes that the contracting officer acted with bias in determining Cimpi nonresponsible, merely asserting circumstances which cause it to assume bias. Inferences or suppositions, are not sufficient to defeat the strong presumption that

^{13/} PCM 2-407.8 f(3) states in relevant part:

...the contracting officer must send a report which includes :

- (i) The contracting officer's statement of the circumstances relevant to the protest, including specific responses to each allegation in the protest and the contracting officer's findings, determinations, and conclusions...

contracting officers act in good faith. Marshall D. Epps, supra. The level of proof required to overcome the presumption of good faith has been described as "well-nigh irrefragable" and will not be sustained by inferences or speculation. See Gregory Lumber Co., Inc. v. U.S., 11 Cl. Ct. 489, 501 (1986) and cases cited therein.

We reject Cimpi's argument that in justifying a finding of nonresponsibility, a contracting officer is limited to the sections cited in the letter communicating that determination to a prospective awardee. Cimpi's argument ignores the close relation between past performance and the experience requirement cited in the contracting officer's decision.

The various criteria for determining responsibility stated in our regulations are interdependent, jointly serving to guide the contracting officer in making the required determination.¹⁷

PCM 1-903.1, which specifies the minimum standards for responsible prospective contractors, states that a prospective contractor must:

(iii) Have a satisfactory record of performance.... Past unsatisfactory performance, due to failure to apply necessary tenacity or perseverance to do an acceptable job, shall be sufficient to justify a finding of nonresponsibility.

As the cited section makes clear, a contracting officer in the diligent execution of his duty must consider the past performance of a prospective awardee since a prospective contractor must have a satisfactory record.¹⁴ Thus, the contracting officer reasonably considered Cimpi's past Postal Service contracting record in order to determine responsibility and justified his nonresponsibility determination, in part, by reference to that record as indicative of a lack of adequate experience.

Turning now to that record, Cimpi's relevant experience tending to demonstrate responsibility affirmatively consists of the following:

(1) Trans Leasing (controlled by Cimpi's principal) successfully operated HCR 130KU, a six month emergency contract requiring two tractors and two 45 foot trailers;

(2) Cimpi successfully operated HCR 130BU, a six month emergency contract requiring two tractors and two 45 foot trailers;

(3) Trans Leasing and Cimpi have successfully operated HCR 13035, a mail contract requiring two twenty-two foot vans.¹⁵

^{14/} The language of the PCM makes this interrelationship clear. PCM 1-903, which states the minimum standards for responsible contractors, uses mandatory language.

^{15/} We do not suggest that all previous performance is relevant to making an affirmative determination of responsibility with respect to the cited section. Some performance may be too distant in the past to reflect the current capabilities of a prospective contractor. See Pamela J. Sutton, supra. Other performance may be excluded from consideration due to a settlement agreement, as is the case here.

^{16/} We omit Cimpi's principal's experience derived from HCR 01111 and HCR 01115, operated by CTC,

The contracting officer could reasonably find this record of experience insufficient to support the award of a contract of the size and scope of the solicited service, which is twenty times larger in size than the current contract operated by Cimpi. See Mr. Cool's Refrigeration and Air Conditioning, P.S. Protest No. 84-53, October 10, 1984.

The record also indicates that the contracting officer was unable to acquire requested business information from Cimpi, in particular, a current balance sheet, a profit and loss statement and a cash flow statement. It is reasonable for a contracting officer to draw a negative conclusion about a prospective awardee's requisite business skills and organization when that prospective awardee fails to provide such information. Marshall D. Epps, supra; Westpac Airlines, Inc., P.S. Protest No. 87-04, February 24, 1987. Further, the contracting officer was justified in finding that, based on the information available to him, Cimpi's current management, organization and business skills, although adequate to support a contract requiring two trucks, were inadequate to support a contract of the size and scope of the solicited service. Mr. Cool's, supra.

On the record before us, the contracting officer's determination of Cimpi's nonresponsibility was neither arbitrary nor capricious. Additionally, that record shows that the determination was reasonably based on substantial information. Accordingly, we will not disturb it. Craft Products Company, supra.

The protest is denied.

William J. Jones
Associate General Counsel

[checked against original JLS 3/4/93]

since Mr. Cimpi contends that he was not in control of that corporation and should not be chargeable with its transgressions. If those unsuccessful contracts cannot count against Mr. Cimpi, they cannot reasonably serve to demonstrate his experience. Similarly, we exclude HCR 01016 since it is the subject of a settlement agreement which precludes consideration of its implications for responsibility.